

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
P.L., Appellant)	
)	
and)	Docket No. 21-0821
)	Issued: April 15, 2022
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Bellmawr, NJ,)	
Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Russell T. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On May 7, 2021 appellant, through counsel, filed a timely appeal from a November 10, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the November 10, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On March 17, 2014 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 16, 2014 he injured his lower back while bending to lift letter trays from an all-purpose container. He stopped work on the date of injury and returned to full-duty work on July 20, 2014. By decision dated June 30, 2014, OWCP accepted the claim for thoracic or lumbosacral radiculitis or neuritis, and lumbar intervertebral disc displacement without myelopathy. It paid appellant wage-loss compensation on the supplemental rolls for intermittent periods of disability commencing May 3, 2014.

In a January 30, 2018 report, Dr. Nicholas P. Diamond an osteopathic physician Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and medical treatment. He related appellant's physical examination findings and indicated that manual muscle strength testing of appellant's upper extremities revealed that appellant's supraspinatus, deltoid, triceps and biceps had 4/5 strength bilaterally. Dr. Diamond also related that Semmes Weinstein Monofilament testing revealed decreased sensation on the left at L5 and S1, and on the right at L4 and S1. He provided an impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ and Proposed Table 2 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the sixth edition (July/August 2009) (*The Guides Newsletter*). Dr. Diamond determined that appellant's sensory and motor deficits associated with the bilateral L5 and S1 nerve distributions warranted a finding that appellant had seven percent permanent impairment of each lower extremity, and that he had reached maximum medical improvement (MMI) as of the date of the examination.

On March 19, 2018 Dr. Steven J. Valentino, an osteopathic physician Board-certified in orthopedic surgery, examined appellant for low back pain. On examination, he noted that palpation of the lumbar spine and lower back revealed significant spasm and facet synovitis and effusion, intact deep tendon reflexes, and an otherwise normal motor and sensory examination. Dr. Valentino diagnosed lumbar ligaments sprain, lumbar intervertebral disc displacement without myelopathy, and low back pain.

On April 20, 2018 appellant filed a claim for a schedule award (Form CA-7).

On May 2, 2018 OWCP forwarded the case record, including Dr. Diamond's January 30, 2018 report and a statement of accepted facts (SOAF), to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that Dr. Katz review the report and provide an opinion regarding permanent impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

In a report dated May 10, 2018, Dr. Katz related that Dr. Diamond's January 30, 2018 report supported a finding that appellant had seven percent permanent impairment of each lower

⁴ A.M.A., *Guides* (6th ed. 2009).

extremity. However, he recommended a second opinion evaluation as there was significant conflict between the findings of Dr. Valentino with respect to motor and sensory deficits and Dr. Diamond in his March 19, 2018 report, which could not be resolved on the basis of a medical record review. Dr. Katz indicated that MMI was undetermined, pending a second opinion evaluation.

On December 18, 2018 OWCP referred appellant, a SOAF, and a series of questions for a second opinion evaluation with Dr. Stanley Askin, a Board-certified orthopedic surgeon, and requested that he provide an assessment of appellant's work-related condition and any resulting permanent impairment. In a report dated January 11, 2019, Dr. Askin related that appellant had no anatomic change due to the March 16, 2014 incident, but rather that he had degenerative changes which were grossly misattributed as consequential to the March 16, 2014 incident. While he noted that a January 9, 2017 electromagnetic imaging scan identified peripheral neuropathy of the bilateral lower extremities consistent with acute chronic left L4 and L5-S1 radiculopathy, it did not establish that the radiculopathy was necessarily the cause of appellant's complaints or that it was consequential to the March 16, 2014 employment incident. Dr. Askin related that appellant had reached MMI on March 28, 2014. He found no neurologic impairment of the upper or lower extremities, bilateral lower extremity sensation preserved to light touch, 90 degrees bilateral straight leg raising, normal manual testing of the quadriceps, ankle and toe motors, and hip abductors, adductors, flexors, extensors. Dr. Askin concluded that appellant had no neurologic impairment and concurred with Dr. Valentino's assessment.

In a February 1, 2019 report, Dr. Katz indicated that he had reviewed Dr. Askin's January 11, 2019 report. He concurred with Dr. Askin's assessment that appellant's lack of neurologic deficits in both lower extremity demonstrated that no ratable permanent impairment was present pursuant to *The Guides Newsletter*.

On March 14, 2019 Dr. Diamond reviewed the reports from Dr. Askin and Dr. Katz, and disagreed with their conclusions that appellant had no lower extremity sensory deficit. He asserted that Dr. Askin failed to properly evaluate appellant's sensory abnormalities as he did not use the Semmes Weinstein Monofilament testing and that according to the A.M.A. *Guides* using monofilament is the optimum choice for objective touch examination. Dr. Diamond reiterated his opinion that appellant had seven percent right lower extremity permanent impairment and seven percent left lower extremity permanent impairment pursuant to the A.M.A., *Guides*.

On April 3, 2019 OWCP sought clarification from Dr. Katz regarding his February 5, 2019 report and provided Dr. Diamond's March 14, 2019 report for his review. In an April 5, 2019 addendum report, the DMA reviewed the record along with Dr. Diamond's March 14, 2019 report. He related that the A.M.A., *Guides* did not require Semmes-Weinstein monofilament testing to establish or refute sensory deficits. The DMA advised that Dr. Askin's bilateral lower extremity motor and sensory findings were consistent with Dr. Valentino's March 14, 2018 examination findings. Thus, based on the examination findings of Dr. Askin and Dr. Valentino, his opinion that appellant had zero percent bilateral lower extremity permanent impairment remained unchanged.

OWCP subsequently referred appellant, an updated SOAF, and a list of questions for an impartial medical examination with Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding the diagnosis and any permanent impairment due to the accepted employment injury. The May 8, 2019 SOAF noted that the claim

had been accepted for thoracic or lumbosacral neuritis or radiculitis and lumbar intervertebral disc displacement without myelopathy.

In a report dated September 27, 2019, Dr. O'Dowd, based upon a review of the medical record, SOAF, and physical examination, opined that appellant sustained a lumbar strain/sprain and probable thoracic strain/sprain due to the accepted March 16, 2014 employment injury, which he noted were not accepted conditions. He noted that according to the SOAF, the accepted conditions were thoracic or lumbosacral radiculitis or neuritis and lumbar intervertebral disc displacement without myelopathy. Dr. O'Dowd reported that appellant had normal lower extremity reflexes, normal sensation, and normal motor weakness. He opined that appellant reached MMI within three to six months after the injury based on type of injury sustained the fact that there was no change in the diagnostic tests over an extended period of time. Dr. O'Dowd advised that he was unable to comply with OWCP's request for a permanent impairment rating as Dr. Askin's report had not been included for his review.

On April 9, 2020 OWCP requested that Dr. O'Dowd provide an addendum report specifically addressing the conflict in medical opinion evidence.

In an addendum report dated April 20, 2020, Dr. O'Dowd noted that the conflict in medical opinion was between Dr. Diamond and Dr. Askin as to whether appellant had any neurologic permanent impairment of the lower extremities. He opined that appellant sustained a lumbar sprain/strain due to the accepted employment injury, which the SOAF referred to as thoracic or lumbosacral neuritis or radiculitis, and displacement of intervertebral disc without myelopathy. Based on his physical examination, Dr. O'Dowd found that appellant had no neurologic changes. A review of magnetic resonance imaging (MRI) scans revealed slow chronic changes, no acute injury, and no evidence of a herniation. Dr. O'Dowd explained this was supported by the lack of evidence of a significant injury in a 2019 MRI scan. He advised that if appellant had a neurologic defect that a rating of seven percent permanent impairment of each lower extremity was not unreasonable. However, Dr. O'Dowd found no neurologic deficits or any permanent injury due to the accepted March 16, 2014 employment injury. Thus, he concluded that appellant did not have a permanent impairment of the bilateral lower extremities pursuant to the A.M.A., *Guides*.

By decision dated May 20, 2020, OWCP denied appellant's claim for a schedule award.

On May 27, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on September 3, 2020.

With a letter dated August 31, 2020, counsel enclosed an August 14, 2020 report from Dr. Diamond. He asserted that Dr. O'Dowd had been improperly selected as he had prior interactions with appellant when he treated appellant's son for a broken left wrist 10 to 15 years prior.

Dr. Diamond, in an August 14, 2020 report, reviewed Dr. O'Dowd's September 27, 2019 report and reiterated his opinion that Dr. Dowd had misapplied the A.M.A., *Guides* as the only way to detect mild sensory deficits was by use of the Semmes Weinstein Monofilament method. He again concluded that appellant had seven percent left lower extremity permanent impairment, and seven percent right lower extremity permanent impairment.

By decision dated November 10, 2020, an OWCP hearing representative affirmed the denial of appellant's claim for a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing federal regulations,⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.⁹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁰

The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.¹¹

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹² In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* See also *D.D.*, Docket No. 20-0897 (issued August 11, 2021); *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); see also Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *D.D.*, *supra* note 7; *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁰ *Supra* note 8 at Chapter 2.808.5(c)(3) (March 2017).

¹¹ *Supra* note 8 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹² 5 U.S.C. § 8123(a).

specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS

The Board finds that this case is not in posture for a decision.

While a conflict existed in the medical opinion evidence between Dr. Diamond, appellant's treating physician, and Dr. Askin, OWCP's second opinion physician, as to whether appellant had any lumbar spine neurologic deficits which were ratable under *The Guides Newsletter*, the Board finds that Dr. Askin's opinion contradicts the SOAF, which makes clear that OWCP had accepted, as employment related, thoracic or lumbosacral radiculitis or neuritis and lumbar intervertebral disc displacement without myelopathy due to the accepted March 16, 2014 employment injury. In his report dated January 11, 2019, Dr. Askin related that appellant had no anatomic change due to the March 16, 2014 incident, but rather that he had degenerative changes which were grossly misattributed as consequential to the March 16, 2014 incident. He also related that a January 9, 2017 electromagnetic imaging scan identified peripheral neuropathy of the bilateral lower extremities consistent with acute chronic left L4 and L5-S1 radiculopathy, it did not establish that the radiculopathy was necessarily the cause of appellant's complaints or that it was consequential to the March 16, 2014 employment incident. OWCP procedures provide that, when a second opinion or referee physician selected by OWCP renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁴ As Dr. Askin disregarded the findings made in the SOAF, his opinion regarding the rating of appellant's permanent impairment was of no probative value.

OWCP had referred appellant to Dr. O'Dowd for an impartial medical evaluation; however, as no true conflict existed in the medical evidence at the time of the referral, the Board finds that his reports may not be afforded the special weight of an IME and should instead be considered for its own intrinsic value.¹⁵ The referral to Dr. O'Dowd is therefore considered to be that of a second opinion evaluation. However, Dr. O'Dowd also disregarded the accepted conditions noted in the SOAF and opined that appellant sustained a lumbar sprain/strain and probable thoracic sprain/strain due to the accepted March 16, 2014 employment injury. Based on his review of MRI scans taken after the March 16, 2014 injury and the most recent one in 2019, he dismissed the diagnostic test findings and found no evidence of any significant injury. OWCP accepted that appellant's accepted March 16, 2014 employment injury caused thoracic or

¹³ *D.D.*, *supra* note 7; *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁴ *Supra* note 8 at Chapter 2.810.11 (September 2010); *see T.M.*, Docket No. 20-1143 (issued December 14, 2020); *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Roger W. Griffith*, 51 ECAB 491 (2000).

¹⁵ *L.G.*, Docket No. 20-0611 (issued February 16, 2021). *See also M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the IME was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

lumbosacral radiculitis or neuritis and lumbar intervertebral disc displacement without myelopathy conditions. As Dr. O'Dowd's opinion is inconsistent with the SOAF, it is also of no probative value.¹⁶

Once OWCP undertook development of the record, it was required to complete development of the record by procuring medical evidence that would resolve the relevant issue in the case.¹⁷

On remand, OWCP shall refer appellant and a SOAF to a new physician in the appropriate field of medicine for a second opinion evaluation as to the extent of appellant's permanent impairment, if any, due to the accepted conditions of thoracic or lumbosacral radiculitis or neuritis and lumbar intervertebral disc displacement without myelopathy conditions. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 15, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁶ *Id.*

¹⁷ *See L.B.*, Docket No. 21-0319 (issued August 9, 2021).